U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF W-&C-, P.C.

DATE: MAY 16, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an accounting firm, seeks to employ the Beneficiary as an accountant. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage.

On appeal the Petitioner submits a brief and additional documentation and asserts that the evidence establishes its ability to pay the proffered wage.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[1] of the petition onward. In this case the proffered wage is $80,413 per year and the priority date is August 18, 2017.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case the record indicates that the Beneficiary began working for the Petitioner in 2014 or 2015. Copies of the Beneficiary's Forms W-2, Wage and Tax Statements, for 2017 and 2018 show that he received "wages, tips, other compensation" of $48,300 in 2017 and $85,000 in 2018. Thus, the Beneficiary's compensation exceeded the proffered wage in 2018,[2] but not in 2017. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of August 18, 2017, onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. In this case, the difference between the proffered wage and the wages paid to the Beneficiary in 2017 was $32,113.

---

[1] The "priority date" of a petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

[2] Since the record does not include a copy of the Petitioner's federal income tax return for 2018, or an annual report for 2018, or an audited financial statement for 2018, the Petitioner should submit at least one of these documents, in accord with the requirements of 8 C.F.R. § 204.5(g)(2), in any future proceedings associated with this petition.

The record includes a copy of the Petitioner's federal income tax return, Form 1120S, for 2017. If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation"). In this case, a figure of $18,817 is entered on page 1, line 21, but there are deductions entered in Schedule K and the income reconciliation figure in line 18 is $13,221. Thus, the Petitioner's net income in 2017 was $13,221, which was $18,892 short of the amount needed to cover the $32,113 difference between the proffered wage and wages paid to the Beneficiary that year. As for the net current assets, the Petitioner had none in 2017. Net current assets (or liabilities) are determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18, respectively, of Schedule L. In this case the Petitioner's current assets were $22,647 and its current liabilities were $36,687 in 2017, resulting in net current liabilities of $14,040. Accordingly, the Petitioner did not have sufficient net income or net current assets to cover the difference between the proffered wage and the wages paid to the Beneficiary in 2017.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The record indicates that the Petitioner has been in business since the late 1980s, has been solely owned by [redacted] since the death of the only other shareholder in 2014, and had four employees at the time the petition was filed in 2018. The Petitioner asserts that it has a solid reputation in the accounting industry after 30 years of operation, and submits evidence of peer reviews by state and national accounting industry organizations. According to the Petitioner, its income dipped following the death of the co-owner in 2014, a one-time occurrence from which it was recovering in 2017 and 2018. The tax returns in the record do not corroborate this claim, since they recorded gross receipts as rising after the co-owner's death from $377,691 in 2014, to $398,136 in 2015, and to $424,967 in 2016, before declining to $334,233 in 2017. The Petitioner refers to its business bank accounts as a source of funds to pay the Beneficiary's proffered wage. While the regulation at 8 C.F.R. § 204.5(g)(2) allows for other documentation such as bank account records "in appropriate cases," the Petitioner has not demonstrated why its federal income tax return for 2017, the one type of required documentation it submitted for 2017, paints an inaccurate or incomplete picture of its financial situation. Bank statements show an account balance on a given date, not the

account holder's sustainable ability to pay a proffered wage. The Petitioner has not shown that the money in its bank accounts constituted an additional financial resource not reflected on its tax return as taxable income (income minus deductions) and/or cash listed on Schedule L.

The Petitioner points out that the $85,000 it paid the Beneficiary in 2018 was more than the proffered wage, and asserts that it is on track to pay the Beneficiary $85,000 again in 2019. As for the priority year of 2017, the Petitioner asserts that its sole owner (and president), [redacted] could have foregone some of his income from the business, recorded as officer's compensation on the company's federal income tax returns, to pay the Beneficiary's proffered wage. The Petitioner's Forms 1120S for 2015 and 2016, the first two years in which [redacted] was the sole shareholder, recorded officer's compensation of $175,000 and $141,500, respectively. In 2017, however, the Petitioner's Form 1120S recorded officer's compensation of only $57,500. In a letter to USCIS dated April 2, 2018, submitted in response to the Director's request for evidence, [redacted] stated that he was willing to forego some of his officer's compensation to pay the Beneficiary's proffered wage. His statement, however, focused on the pre-priority date years of 2015 and 2016, when his officer's compensation was much higher, and referenced a figure of $12,565[3] as the amount needed to pay the full proffered wage in the pre-priority date year of 2016. On appeal [redacted] submits another letter, dated August 22, 2018, reiterating his willingness to forego some of his officer's compensation to pay the Beneficiary's proffered wage, and incorrectly asserts that the amount needed was only $1,176[4] in 2017. As previously discussed, however, the difference between the proffered wage, $80,413, and the sum of the Petitioner's net income, $13,221, and the wages paid to the Beneficiary, $48,300, in 2017 was actually $18,892, an amount that represents approximately one-third of [redacted] officer's compensation that year. Since [redacted] did not state that he was willing and able to forego one-third of his officer's compensation in 2017, and based his commitment to forego a portion of his officer's compensation on the false calculation that the amount required was only $1,176, we find that [redacted] has not established that he was willing and able to forego a sufficient portion of his officer's compensation to cover the $18,892 difference between the proffered wage and the sum of the Petitioner's net income and the Beneficiary's wages paid in 2017.

In accord with the foregoing analysis, we conclude that the Petitioner has not established its continuing ability to pay the proffered wage of $80,413 per year from the priority date of August 18, 2017, onward based on the totality of its circumstances.

---

[3] The figure of $12,565 appears to be derived by adding the Petitioner's "ordinary business income" in 2016 to the wages paid the Beneficiary in 2016, and subtracting that total from the proffered wage.

[4] In calculating the figure of $1,176, [redacted] added the Petitioner's "ordinary business income" of $18,817 in 2017 to the Beneficiary's salary and bonus of $60,420 as of August 2018 (the Beneficiary's pay was subsequently increased to $85,000 for the year), and subtracted that total ($79,237) from the proffered wage of $80,413. The calculation was erroneous, however, because it combined amounts from two different years and because the Petitioner's net income in 2017 was not the "ordinary business income" figure on page 1, line 21, of the Form 1120S, but rather the income reconciliation figure in Schedule K, line 18, which was only $13,221.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward. The appeal will be dismissed for the above stated reason. In visa petition proceedings it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden

ORDER: The appeal is dismissed.

Cite as *Matter of W-&C-, P.C.*, ID# 4635536 (AAO May 16, 2019)